IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-75

LEON W. KNIGHT, ET AL.,
Petitioners,

v.

THE HONORABLE GERALD W. HEANEY, UNITED STATES CIRCUIT JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND EARL R. LARSON AND DONALD D. ALSOP, UNITED STATES DISTRICT JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA,
Respondents.

ON MOTION FOR LEAVE TO FILE PETITION FOR EXTRAORDINARY WRIT DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
and
PETITION FOR EXTRAORDINARY WRIT

PETITIONERS' REPLY BRIEF

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10 September 1979

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PETITIONERS' REPLY BRIEF

Defendants National Education Association (NEA), Minnesota Education Association (MEA), Minnesota Community College Faculty Association (MCCFA), and Independent Minnesota Political Action Committee for Education (IMPACE)—the component parts of the United Teaching Profession (UTP)—have filed a brief in opposition to the Petition for Extraordinary Writ. If anything, the UTP's brief highlights the propriety and necessity of extraordinary relief in this case.

I. This Court has exclusive jurisdiction under the All Writs Act to decide whether the District Court abused its discretion by denying Petitioners discovery necessary to make a full factual record for decision of the constitutional issues in this case.

Petitioners have demonstrated why this Court has exclusive jurisdiction under the All Writs Act to issue an extraordinary writ in this case.[1] The UTP claims, however, that:

> (i) "the power to issue the writ requested by petitioners lies with all courts possessing appellate jurisdiction that could arguably be aided by issuing the writ";
>
> (ii) "the Court of Appeals [for the Eighth Circuit] possesses immediate appellate jurisdiction over the issues raised by petitioners";
>
> (iii) "[t]he denial of the motion to reopen discovery involves neither a grant or denial of injunctive relief nor a decision on the underlying constitutional question. Direct appellate jurisdiction, therefore, lies only with the Court of Appeals"; and
>
> (iv) although this Court has "concurrent" jurisdiction to issue the writ, it should defer to the Court of Appeals.[2]

These claims misconceive the nature and extent of this Court's, and of the Court of Appeal's, jurisdiction under the All Writs Act.

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[1] Petition for Extraordinary Writ (P.) 2-4.

[2] Defendant Labor Organizations' Brief in Opposition (B.) 4, 5, 6, 7-8.

The issuance of an extraordinary writ must be either an exercise of appellate jurisdiction, or an act necessary to enable the issuing court to exercise present, or to protect prospective, appellate jurisdiction.[3] Jurisdiction to issue the writ depends upon the court's ultimate power to review the question involved in the petition,[4] upon the potential perfection of an appeal on this question,[5] and upon the possible defeat of ultimate appellate review of that question absent immediate intervention.[6] Furthermore, in the exercise of its power under the All Writs Act, this Court can defer to a Court of Appeals only where that Court has "direct appellate jurisdiction" or "appellate jurisdiction on direct appeal" regarding the legal issue underlying the petition for extraordinary writ.[7]

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[3] *Ex parte* United States, 287 U.S. 241, 245-46 (1932).

[4] *See, e.g.*, United States v. United States District Court, 334 U.S. 258, 263 (1948). The "ultimate power to review" may be by writ of certiorari. *Ex parte* United States, 287 U.S. 241, 246 (1932).

[5] *See, e.g.*, Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

[6] *See, e.g.*, McClelland v. Carland, 217 U.S. 268, 280 (1910).

[7] *See, e.g., Ex parte* United States, 287 U.S. 241, 248-49 (1932); *Ex parte* Republic of Peru, 318 U.S. 578, 584 (1943).

Of course, in cases of "public importance and exceptional character" this Court will not "relegate the [petitioner] to the circuit court of appeals, from which it might be necessary to bring the case * * * by certiorari", even where no three-judge court is involved. *Ex parte* Republic of Peru, 318 U.S. at 586. This case, involving as it does the application of *Elrod* v. *Burns*, 427 U.S. 347 (1976), is one of "public importance and exceptional character". *Compare* Branti v. Finkel, 457 F. Supp. 1284 (S.D.N.Y. 1978), *aff'd without opinion*, 598 F.2d 609 (2d Cir.), *cert. granted*, 47 U.S.L.W. 3821 (U.S., 26 June 1979) (No. 78-1654), *with* Rule 19(1)(b) of the Rules of this Court.

The question Petitioners present for review is whether the District Court abused its discretion under the Federal Rules of Civil Procedure and the Fifth Amendment to the United States Constitution by denying Petitioners discovery necessary to make a full factual record in support of their constitutional claims for injunctive relief against certain applications of Minnesota's Public Employment Labor Relations Act. The UTP incorrectly asserts that the Court of Appeals has "immediate" and "direct appellate jurisdiction" over this question. However, the District Court's order foreclosing further discovery is neither a final decision nor one granting or denying an injunction, and therefore is now appealable to neither this Court nor the Court of Appeals.[8] Moreover, Petitioners can appeal the order only after an adverse final decision on the constitutional merits of the case.[9] Then, appeal will lie exclusively to this Court.[10] But by that time the Dis-

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[8] *See* 28 U.S.C. §§ 1253, 1291 (1970).

[9] Should the District Court base an adverse final judgment on a non-constitutional ground, its denial of necessary discovery addressed to the constitutional merits will evidently not suffice as reversible error in the Court of Appeals.

[10] If Petitioners lose on the constitutional merits at trial because of their inability, under the District Court's order foreclosing discovery, to muster sufficient evidence of the UTP's essentially political character, the Court of Appeals will have no appellate jurisdiction—"immediate", "direct", or even "concurrent"—to reverse the District Court's judgment on the basis of error in the latter order, and to remand for additional discovery and a new trial. This absence of prospective appellate jurisdiction over the very issue Petitioners now raise decisively militates against the UTP's position. *Compare and contrast* National Farmers' Org'n v. Oliver, 530 F.2d 815, 816-17 (8th Cir. 1976) (mandamus appropriate remedy where District Court denied petitioner opportunity to make a complete record on certain matters, and where District Court's error could not be corrected effectively on direct appeal to Court of Appeals).

trict Court's condonation of the UTP's "cover-up" may have defeated this Court's appellate jurisdiction.[11]

In short, this Court has exclusive power of appellate review over the discovery-question Petitioners raise. The Court of Appeals has no appellate jurisdiction over that question, immediate or eventual, direct or indirect. Furthermore, Petitioners can perfect an appeal to this Court on the question, should they lose at trial on the constitutional merits of the case because of insufficiency of evidence. But Petitioners cannot appeal an adverse judgment on the constitutional merits to the Court of Appeals, no matter what errors they cite. And finally, denial of the Petition for Extraordinary Writ threatens to defeat this Court's exclusive appellate jurisdiction over the constitutional merits herein. Yet such denial cannot affect an appellate jurisdiction the Court of Appeals does not have. Therefore, rather than supporting the UTP's contention that the Court of Appeals has jurisdiction over the Petition, the very opinions of this Court upon which the UTP relies establish that the Petition is properly here.[12]

Consideration of this Court's decisions under the old Expediting Act confirms this conclusion.[13] To impugn these authorities, the UTP notes that

> Petitioners rely on several cases (Petition at 4 n.5) to support their contention that this Court "has exclusive jurisdiction * * *." The cited cases are inapposite.

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[11] *See* P. 53 n.93.

[12] *Ex Parte* Republic of Peru, 318 U.S. 578 (1943), *and Ex parte* United States, 287 U.S. 241 (1932), *cited at* B. 7.

[13] *E.g.*, Tidewater Oil Co. v. United States, 409 U.S. 151 (1972); United States Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196 (1945).

> The bulk of these cases * * * involved * * * the Expediting Act * * *.
>
> Petitioners' application, on the other hand springs from a case for which appellate jurisdiction is based on 28 U.S.C. § 1253.[14]

The UTP fails to recall, however, that (as this Court noted) "[t]he three-judge-court procedure, with expedited review, was modeled after the Expediting Act".[15] And therefore the reasoning of the Expediting-Act decisions is particularly applicable here.

The Expediting Act restricted appeals from final judgments in the District Court to this Court, and made no provision for appeals from interlocutory orders. Under these circumstances, this Court also assumed exclusive jurisdiction over petitions for ex-

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[14] B. 7 n.2. The UTP's footnote 2 typifies its refusal to acknowledge, let alone address, the authorities Petitioners marshal. By disingenuously claiming that all the cases Petitioners cite at P. 4 n.5 are "inapposite" because some involved the old Expediting Act, the UTP apparently hopes to evade the import of *Blay* v. *Young*, 509 F.2d 650 (6th Cir. 1974), in which the Court of Appeals abjured jurisdiction to issue extraordinary writs in three-judge-court cases, and of *Williams* v. *Simons*, 355 U.S. 49 (1957), in which this Court issued an order to show cause (later discharged as moot) where a party sought an extraordinary writ to compel a three-judge District Court *inter alia* to vacate a temporary restraining order that that Court had continued without passing on the constitutional merits of the complaint.

[15] Steffel v. Thompson, 415 U.S. 452, 465 n.16 (1974). The footnote in *Steffel* also refers to a "1906 Act * * * applying the same procedure to suits brought to restrain, annul, or set aside orders of the Interstate Commerce Commission". Thus the pertinence of *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968), *cited at* P. n.5—another decision favorable to Petitioners that the UTP does not mention.

traordinary writs in Expediting-Act cases.[16] In three-judge-court practice under 28 U.S.C. §§ 1253 and 2281 (1970), there are two categories of final judgments: (i) those that grant or deny injunctions on the constitutional merits, and are appealable to this Court only; and (ii) those that dispose of the case on all other grounds, and are appealable to the Courts of Appeals alone. Petitions for extraordinary relief in the nature of mandamus never deal with the merits directly.[17] But some issues appropriate for review under such petitions so interrelate with the merits in a practical sense that they cannot be severed from them procedurally without impinging adversely on the final decision of the case at trial and on appeal. The District Court's order foreclosing further discovery raises an issue of this kind.

The order denies Petitioners the discovery necessary for a full factual record in support of their constitutional claims. Yet the development of a complete record is the *sine qua non* of proper constitutional adjudication: For the record defines and controls the nature of the issue presented on appeal, thereby determining and circumscribing the very existence and exercise of appellate jurisdiction. The denial of an opportunity to make a comprehensive record in the trial-court, then, is inextricable from decision of the merits of Petitioners' constitutional case at trial and

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[16] Tidewater Oil Co. v. United States, 409 U.S. 151, 154-61 (1972).

[17] *Cf.* Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1310, ——, 98 S. Ct. 2, 4 (1977) (Rehnquist, Circuit Justice).

on appeal to this Court.[18] And the order denying discovery therefore falls into the category of non-final decisions so closely related to the ultimate constitutional merits of this litigation that only this Court can have jurisdiction to review them under the All Writs Act.[19]

This Court alone has jurisdiction to grant the extraordinary relief now imperative if Petitioners are to enjoy a full, fair, and adequate hearing of their constitutional claims.[20]

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[18] Absent unique circumstances, the grant of excessive discovery raises less immediate concerns, since this Court will presumably exclude from consideration on appeal evidence that should not have been used as the basis for summary judgment, or introduced at trial. This Court cannot consider *undiscovered* evidence, however, no matter how material and admissible.

[19] In response to this argument, the UTP proffers only the *non sequitur* that

> [t]he denial of the motion to reopen discovery involves neither a grant or denial of injunctive relief nor a decision on the underlying constitutional question. Direct appellate jurisdiction, therefore, lies only with the Court of Appeals for the Eighth Circuit.

B. 6. Because the order denying further discovery is not a final "grant or denial of injunctive relief", there is no appellate jurisdiction in any court—only jurisdiction under the All Writs Act. But, because the order does directly and irremediably impinge in a practical way on "the underlying constitutional question", only this Court can entertain the Petition attacking that order as an abuse of discretion.

[20] *Pace* the UTP's contrary assertion. B. 8 & n.3. Indeed, the only relevant decision of the Court of Appeals for the Eighth Circuit that Petitioners have found—and the UTP cites no others—evidences that Court's aversion to assuming jurisdiction over three-judge-court matters. Doe v. Turner, 488 F.2d 1134 (8th Cir. 1973).

In the face of Petitioners' extensive reliance on decisions of this Court, the UTP interposes a make-weight argument based on *Breed* v. *United States District Court for the Northern District of Cali-*

II. The United Teaching Profession fails to refute Petitioners' showing that the District Court's denial of further discovery in this case is an unprecedented misapplication of the Federal Rules of Civil Procedure, and a clear violation of the Fifth Amendment to the United States Constitution.

The UTP's assertions that the District Court's termination of Petitioners' discovery is not an usurpation

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fornia, 542 F.2d 1114 (9th Cir. 1976). B. 6-7, 8. In *Breed*, the Court of Appeals assumed jurisdiction to review on petition for mandamus an order of a three-judge District Court granting certain discovery:

> • • • we have jurisdiction over appeals from appealable orders of three-judge district courts that do not resolve the merits of the constitutional claim presented. • • • We apply the same principle where petitioners seek an extraordinary writ, because § 1651 empowers us to issue such a writ "in aid of" our appellate "jurisdiction".

542 F.2d at 1115. But nowhere in its opinion did the *Breed* Court consider: (i) that the recognized limitation on its "jurisdiction over appeals from appealable orders" implied a parallel limitation of its jurisdiction under § 1651; and (ii) that, since it could never acquire jurisdiction to reverse a final decision on the constitutional merits because of the trial-court's erroneous interlocutory discovery-order, it could not logically deal with such an issue on petition for mandamus "in aid of" a jurisdiction foreclosed to it.

The readiness with which the *Breed* Court assumed jurisdiction is understandable in light of its holding that the issue there was controlled by its and this Court's contemporaneous decision in *Kerr* v. *United States District Court for the Northern District of California*, 511 F.2d 192 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976) (order of single judge granting discovery not reversible on mandamus). *See* 542 F.2d at 1114, 1115. Moreover, *Breed* may also be rationally defensible in that it addressed a *grant* of discovery, not a denial. *See supra* note 18. In any event, Petitioners need not labor to reconcile *Breed* with this Court's contrary decisions on extraordinary writs—a task, interestingly enough, that the UTP never undertakes, let alone accomplishes. Rather, it suffices to note that the UTP once again errs when it says that "[t]his petition is indistinguishable from that involved in *Breed*". B. 6.

of power amount only to naked denials or question-begging.

First, the UTP cites nothing in support of its claim that "[t]his case involves a settled question of judicial administration * * * and not an undecided question of public importance".[21] Its inability to find even one legal authority sustaining such activities as Petitioners exposed to the District Court highlights Petitioners' exhaustive catalogue of contrary decisions under the Federal Rules of Civil Procedure,[22] federal-court post-judgment practice,[23] and the Fifth Amendment.[24] Indeed, the settled law unanimously implies that the District Court's order denying necessary discovery is an unprecedented abuse of discretion; and the aberrance of that order underscores the substantial importance for this Court expeditiously and definitively to resolve the question Petitioners raise.[25]

Second, the UTP ignores the leading decisions on mandamus when it denies that "petitioners raise issues peculiarly appropriate for direct review by this Court".[26] For the Petition concerns the construction and application of the Federal Rules of Civil Procedure (as well as their interrelation with the Fifth Amendment)—an issue this Court has unequivocally held is "appropriate for [it] to determine on the merits * * * and to formulate the necessary guide-

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[21] B. 8.

[22] P. 31-39 & nn.27-54.

[23] P. 46 & nn.75-78.

[24] P. 45 & nn.68-74.

[25] *See* Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

[26] B. 8.

lines".[27] Furthermore, chaos in the administration of all civil litigation will almost certainly result from even tacit condonation of the UTP's notion that once a trial-court adopts a discovery-schedule, a party who exposes wrongdoing only at the end of the discovery-period is entitled to no relief under the Federal Rules. This Court, however, has recognized that an extraordinary writ should issue to prevent "so palpably improper" a nullification of the Rules.[28]

Third, although the UTP prates about "[p]laintiffs' argument that a district court usurps power when it establishes discovery deadlines", Petitioners do not complain of the District Court's order of 13 October 1978.[29] Rather, they attack its order of 4 April 1979, that denied them relief under Federal Rule 37 notwithstanding their unrebutted demonstration of the UTP's wrongdoing based almost exclusively on evidence adduced between the hearing of 13 October and the discovery-deadline of 31 December 1978. Indeed, the deadline in this case is beside the point: The District Court's order denying the particularized and limited relief requested in their motion to extend discovery would be an abuse of discretion even if Peti-

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[27] Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964), *citing* Los Angeles Brush Manufacturing Corp. v. James, 272 U.S. 701, 706 (1927).

[28] La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957), *citing* Los Angeles Brush Manufacturing Corp. v. James, 272 U.S. 701, 706 (1927). As this Court said in *La Buy*,

> even a "little cloud may bring a flood's downpour" if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials.

352 U.S. at 258.

[29] B. 10.

tioners were still free to pursue other discovery.[30] (Of course, that Petitioners have no other recourse to secure evidence from the UTP prior to trial exacerbates the order's unconstitutionality.)

In short, that federal courts have rules, and that federal judges may exercise discretion in applying them, is no defense for the UTP. Petitioners do not dispute the existence or propriety of Federal Rules of Civil Procedure 1, 16, and 83; of Local Rule 3(a) of the United States District Court for the District of Minnesota; or of the *Manual for Complex Litigation,* as the UTP implies.[31] Indeed, Petitioners request that certain of the Federal Rules be enforced, and certain procedures suggested in the *Manual* be utilized, on their behalf.[32] The issue, then, is not "Are there valid rules and procedures?", but "Is the District Court's order an abuse of discretion in the face of the Federal Rules and the Fifth Amendment?" And on that issue, the UTP remains silent.[33]

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[30] The limited relief Petitioners requested appears at Petitioners' Appendices (A.) 25-31. Evidently, if Petitioners are entitled (for instance) to redepose Mammenga, or to examine the files of NEA's Government Relations Department, a denial of that entitlement is no less illegal because Petitioners could interrogate some other individual, or inspect some other files. It that were not the case, a Rule 37 order compelling discovery could never issue until discovery closed.

[31] B. 10-11.

[32] *E.g.*, appointment of a magistrate or special master to supervise discovery. A. 29. *See* Manual for Complex Litigation §§ 3.20, 3.21 (1978).

[33] The authorities on which it relies tell an eloquent story in Petitioners' behalf, though:

The *Manual for Complex Litigation* § 1.20 (1978) admonishes that "ordinarily, in a complex case, no summary judgment may be

III. The District Court's original discovery-deadline does not bar the relief Petitioners seek from the United Teaching Profession's refusal to make discovery in good faith.

The UTP contends that "[t]he District Court was well within its discretion when it issued its Order * * * establishing a discovery cut-off date of December 31, 1978", and that, not having opposed this order when

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rendered on a genuine issue of fact in the absence of a fair opportunity to complete discovery on that issue". (Footnote omitted.) Yet, although denying Petitioners complete discovery, the District Court has forcefully expressed a preference for summary proceedings rather than a trial in this case. P. 48-49 n.82. Particularly relevant then is this Court's comment, cited in the *Manual*, that "summary procedures should be used sparingly in complex • • • litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot". Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962) (footnote omitted).

Similarly, the UTP refers to this Court's recognition of "the power inherent in every court to control the disposition of the cases on its docket". B. 11-12, *citing* Landis v. North American Co., 299 U.S. 248, 254-55 (1936). However, it does not quote this Court's holding that "the limits of a fair discretion are exceeded • • • . Relief so drastic and unusual overpasses the limits of any reasonable need, at least upon the showing made when the motion was submitted". 299 U.S. at 256, 257. In light of the precedents Petitioners muster, the District Court's order foreclosing necessary discovery is nothing if not "drastic and unusual • • • upon the showing made when the motion was submitted".

Again, the UTP elaborately reproduces remarks of the Court of Appeals for the Eighth Circuit on "cutting off discovery". B. 12, *citing* Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 144 (8th Cir. 1968). However, it does not quote that Court's ultimate statement remanding the cause for a new trial because "the defendant was prejudiced by the lack of disclosure of the K.U. Medical record". 402 F.2d at 145. Moreover, this statement followed the Court's comments that the disputed document contained evidence which "[t]o a great extent • • • was cumulative", and could

entered, Petitioners may not now complain of it.[34] Once more the UTP begs the question—which is not whether the order of 13 October 1978 was valid on that date, but whether the District Court abused its discretion in refusing to rescind it, notwithstanding the evidence Petitioners subsequently amassed.

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have been subpoenaed at trial in any event. *Id.* at 144. Here, not simply one document, but instead whole files of documents, are involved—documents that in large measure are not even arguably subject to subpoena for production at trial. A. 145-90; P. 49.

And again, the UTP parenthetically invokes a trial-court's "power to order time limitations". B. 12 n.5, *citing* Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433 (E.D. Pa. 1978). The UTP does not mention, though, that "[t]his case presents a picture of persistent and studied indifference • • • to court orders and to the time requirements of the Federal Rules of Civil Procedure", and a "litany of defiance". 80 F.R.D. at 434. Here, the UTP has engaged in "persistant and studied indifference" to the federal discovery-rules, as Petitioners' Appendices describe.

Finally, the UTP quotes the Court of Appeals for the Ninth Circuit as saying that "the district judge presiding over discovery can dictate 'the specific terms and conditions' upon which discovery may be had". Transamerica Computer Co., Inc. v. IBM, 573 F.2d 646, 652 (9th Cir. 1978). However, the UTP carefully avoids quoting the Court's further statement that, "[p]articularly in 'exceptional' cases, • • • this power to establish deadlines is not unlimited, • • • for the parties must be given a fair and adequate opportunity to develop their cases"—or the statement that the trial-court's discovery-schedule would have been "an unreasonable exercise of • • • discretion", had it not been coupled with explicit safeguards. *Id.* at 653, 652, *citing* Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966). Here, Petitioners seek no more than *Transamerica* recognizes: a fair and adequate opportunity to develop their case, notwithstanding a discovery-deadline that events have proven unreasonable.

[34] B. 13, 16-17.

The UTP berates Petitioners for a "lack of candor" before the District Court.[35] The record belies this contention: On 13 October, Petitioners considered 31 December a reasonable date for termination of discovery, presuming that the UTP would comply in good faith with the Federal Rules. Indeed, by 31 December Petitioners deposed all the witnesses they had theretofore identified as important, and fully inspected what the UTP's attorneys represented to be the complete files and archives Petitioners had requested it to produce. If the deponents had not testified falsely, evasively, and incompletely; and if the UTP's counsel had made full disclosure of the files and archives; then Petitioners would have accepted the deadline without complaint.

However, events subsequent to 13 October 1978 evidenced the antithesis of good-faith compliance with the discovery-rules. For example:

- The *post*-13 October testimony of UTP staffmen Bresin, Vander Woude, and Pratt verified the *pre*-13 October discoveries of Petitioners' private investigator.[36]

- The *post*-13 October testimony and document-production of UTP staff-woman Zagrabelny exposed the falsity of the *pre*-13 October testimony of Chesebrough, Johnson, and Sands.[37]

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[35] B. 15. The implication, apparently, is that Petitioners somehow knew on 13 October that they could not complete discovery by 31 December 1978, and secretly intended even at the 13 October hearing to request an extension of discovery later on. How Petitioners would have fulfilled this alleged intention without uncovering massive evidence of its wrongdoing, the UTP does not explain.

[36] A. 259-97.

[37] A. 313-22.

- The *post*-13 October testimony and document-production of UTP staff-persons Baker, Harman, Lowell, and McFarland proved that Letorney's *pre*-13 October testimony was not truthful.[38]

- The *post*-13 October testimony of Baker, Harman, Lowell, and McFarland was itself replete with false and incomplete answers.[39]

- The *post*-13 October production of UTP files and the NEA Archives evidenced a conscious scheme, directed and in some instances openly acknowledged by the UTP's counsel, to withhold or destroy massive amounts of documentary evidence.[40]

- Only just before the 31 December discovery-deadline—and *after* the depositions of Baker, Harman, Lowell, and McFarland—did Petitioners acquire the Shotts thesis, containing the outline of the UTP's 1976 presidential-campaign strategy about which those deponents had not told the whole truth.[41]

Petitioners cannot rationally be faulted for a "lack of candor", then, in not predicting for the District Court on 13 October 1978 what they would discover about the UTP's wrongdoing thereafter.

The UTP then attacks "the thoroughly inappropriate assumption that plaintiffs, through their private

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[38] A. 258-59 n.108.

[39] P. 19-23, *summarizing* A. 137-43, 195-219, 223-34, 237-47, 412-13 n.2.

[40] A. 145-92, *and especially* A. 147-48, 149-52, 169-72, 178, 179, 188-90, 190-92.

[41] On the history of Petitioners' acquisition of this revealing document, *see* P. 20 n.12; A. 412-13 n.2.

investigators, could more effectively deal with the alleged 'conspiracy' than could a United States District Court".[42] Yet the UTP does not suggest how the District Court could "deal" with its malfeasance before Petitioners substantiated their suspicions with specific evidence. Was the Court itself to hold an inquisition—to interrogate witnesses, to review the UTP's (non-) production of documents file-by-file, to search for the Shotts thesis, or perhaps to infiltrate telephone-banks in search of UTP staff-personnel assisting candidates' campaigns under assumed names?

The UTP also belittles Petitioners for their "hope", prior to 13 October, that thereafter it might comply in good faith with the Federal Rules.[43] Disingenuously, it implies that Petitioners should have requested relief from the District Court before they compiled the evidence exposing the "cover-up", leaving for conjecture what relief that Court could have granted in the absence of facts proving bad faith in discovery.[44] Actually, the UTP's discomfiture lies not with the mere timing of Petitioners' action, but with its success in painstakingly collecting, analyzing, and presenting dispositive evidence of the UTP's wrongdoing.[45]

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[42] B. 16.

[43] *Id.*

[44] And, of course, if subsequent to 13 October the UTP's staff-personnel had testified frankly and its counsel had produced all the documents to which Petitioners were entitled, the "cover-up" would have ended, leaving Petitioners with no cause to seek a Rule 37 order from the District Court.

[45] Since Petitioners had no obligation to expose or complain of the UTP's "cover-up" at all, they had no obligation to do so piece-by-piece, or at times and places tactically convenient to the UTP.

Next, the UTP charges that Petitioners "decided to concoct some type of 'conspiracy' to justify a prolonging of the discovery process".[46] The record, though, establishes the improbability of any explanation other than conspiracy for the improper testimony of Baker, Bresin, Chesebrough, Harman, Johnson, Letorney, Lowell, Mammenga, McFarland, Sands, and Vander Woude; for the UTP's withholding and destruction of documents; and for Bresin's reference to "NEA's attorneys".[47]

Finally, the UTP moralizes that "[a] trial court is entitled * * * to presume that counsel means what he says when he agrees to the substance of a proposed court order".[48] To be sure. But the facts in the record on 31 December were strikingly different from those on 13 October 1978. And when Petitioners presented these new facts, the District Court should also have presumed that their fully documented charges were serious, instead of denying their motion summarily without hearing, findings, or opinion.

But, says the UTP, "[p]laintiffs may not complain about the terms of a discovery cut-off date which they agreed to".[49] This, however, is not Petitioners' complaint. Rather, they attack the UTP's actions that thwarted effective discovery before the "cut-off date" and in violation of the Federal Rules. On 13 October 1978, Petitioners agreed to try to finish their discovery by 31 December—presuming that that was physi-

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[46] B. 16.

[47] P. 27-28 n.18. *And see* Part IV., *infra* pp. 20-31.

[48] B. 16-17.

[49] B. 17.

cally possible, and that the UTP cooperated in good faith.[50] Where, in fact, compliance with the deadline was physically impossible, the Magistrate granted Petitioners an extension of time.[51] Why they were not entitled to a similar extension when they showed that the UTP's wrongdoing had rendered compliance with the deadline a violation of their rights is the issue for decision here.

The absurd consequences of the UTP's argument indicates how this Court should decide that issue. Many trial-courts routinely establish discovery-schedules at the outset of litigation with the agreement of all con-

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[50] The UTP itself quotes the pertinent remarks of Petitioners' counsel at the 13 October 1978 hearing:

> We think we are getting just about to the end of what we consider is necessary to the presentation of the case • • • .
>
> • • • •
>
> • • • we ought to be able to get it done, if we really push it, by early December—mid-December.
>
> • • • •
>
> I think we can do that.

B. 14. These statements repel any inference of a "guarantee" that Petitioners would complete their discovery by 31 December, let alone of a willingness on their part to suffer in silence whatever wrongdoing the UTP chose to commit before that date.

[51] When late in 1978 Petitioners sought to depose Matthew Reese, private consultant on political action to NEA, the UTP's attorneys importuned the Magistrate to quash the subpoena because of the oncoming discovery-deadline. The Magistrate had no difficulty denying this motion, and ordering that

> 3. Since plaintiffs have been unable to serve process upon one Matthew Reese *due to no fault on their part*, the termination date for deposition discovery as to him is extended to February 15, 1979. • • •

Order of 22 December 1978, *reproduced in* the UTP's Appendix G, B. at A-118 to A-119 (emphasis supplied).

cerned. According to the UTP, in such a situation, if party *A* cannot expose a "cover-up" by party *B* until the close of discovery, party *B* can prevail by invoking *A's* "agreement" to the original schedule, no matter how illegal or obnoxious *B's* conduct may have been. To sanction this theory will: (i) encourage every litigant with something to hide to pervert the otherwise proper procedure of scheduling discovery into a tool for suppressing it; and (ii) force every litigant honestly seeking evidence on the merits of his case to protect himself against "cover-ups" by additional (and otherwise unnecessary) discovery. What end this unconscionable result will serve, other than the deception of Petitioners and the federal courts as to its political activities, the UTP does not identify.

IV. Rather than disproving Petitioners' charges of wrongdoing in discovery, the United Teaching Profession evades the factual issues.

On the factual merits, the UTP has no defense. Rather, its brief is a pastiche of question-begging, elusion, double-talk, and misrepresentation.

First, it says that

> [t]he plaintiffs have had a full and fair opportunity to conduct discovery in this case. * * * The documents produced in response to plaintiffs' demands number approximately 75,000 to 80,000 document pages. In addition, plaintiffs have taken the depositions of no fewer than 29 staff members of [the UTP] * * *.[52]

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[52] B. 17. The UTP did not acquire an immunity from prospective application of the federal discovery-rules because it produced thousands of document-pages in the past. Massive production of documents is normal in complex litigation involving the day-to-day

Certainly, the UTP has produced document-pages; and its staff-personnel have given deposition-testimony. But are Petitioners entitled only to the documents the UTP chose to produce; or should they have received as well the numerous files and archival materials the UTP withheld, or the documents it destroyed and is now probably destroying? And, where Petitioners have shown that eleven deponents from the UTP testified falsely, evasively, or incompletely, should they be required to accept this testimony anyway to the exclusion of the truth about the UTP's political activism? Evidently, for the UTP to answer that it has produced some documents and its staff-personnel have given some testimony does not rebut the evidence Petitioners amass that its production was designedly incomplete and the testimony of its staff-personnel less than candid.

Second, the UTP contends that, rather than responding to Petitioners' charges individually, it may refute them collectively "through illustration".[53] Mere "illustrations", however, are not enough: For, since each incident of document-withholding, false testimony, and so on is unique, the disproof of one of Petitioners' charges (which the UTP never accomplishes in any event) does not disprove or even discredit others. To the contrary, the UTP's silence attests their cogency.[54]

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activities of large corporations. *See, e.g.*, IBM v. United States, 480 F.2d 293, 295 (2d Cir. 1973) (referring to a trial-court's order to IBM "to produce some 17 million document pages in three months").

[53] B. 18 & n.9.

[54] Thus the fecklessness of the empty bluff that "[d]efendants reject unequivocally the notion that plaintiffs have presented any

Moreover, relief under Rule 37 depends, not upon whether Petitioners have suffered multiple prejudicial invasions of their rights, but upon whether they have suffered any. Therefore, to be secure in its defense (assuming *arguendo* it has one), the UTP would have to show that Petitioners have no basis for a Rule 37 order, not merely that a few bits and pieces of their evidence are supposedly disputable. For the existence of the dispute alone justifies additional discovery. Why, then, did the UTP not present the District Court (or this Court, for that matter) with a point-by-point rebuttal of Petitioners' case? Because (so it says with unheard-of self-restraint and modesty) it "refused to burden" the Court with evidence of its innocence![55] The UTP's few "illustrations", though, indicate the real reason for its reluctance to join issue on the facts: its inability to disprove what Petitioners assert.

Deposition-Testimony

The UTP claims that "neither [Sands nor Johnson] stated that they knew that the 1340 Club was no longer in existence". Yet, in support of this contention,

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evidence of misconduct by defendants or defendants' counsel". B. 18 n.9. Mere statements of counsel are not evidence, and cannot support a trial-court's decision that has no factual basis in the record. *E.g.*, United States v. Howard, 360 F.2d 373, 376 n.4 (3d Cir. 1966); Thornton v. United States, 493 F.2d 164, 167 (3d Cir. 1974).

[55] B. 18 n.9. From the perspective of practical litigation, the argument is ludicrous—since this Court can, and Petitioners submit should, credit their statement of facts unless (as is never the case) the UTP expressly controverts it. *E.g.*, Investment Funds Corp. v. Bomar, 306 F.2d 32 (5th Cir. 1962).

it brazenly quotes Sands as testifying that "I'm not aware if the 1340 exists", and Johnson as saying that "it's defunct", "I haven't heard anything from the 1340 Club", and "[t]here doesn't seem to be any action going on associated with an attempt to organize it, reorganize it or keep it going".[56] This defense is not only self-contradictory as presented, but also incredible in light of the record.[57]

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[56] B. 19. An illuminating sidelight is that the quotation from Johnson's deposition elides testimony from two separate days, and excises entirely the obvious signal from the UTP's counsel to the witness during direct examination. *See* A. 315.

Even more revealing, subsequent to Johnson's deposition, the reason the UTP's attorneys gave for not wanting to present MEA's staff-woman Zagrabelny for deposition was that her possible testimony on the "1340 Club/Committee" was largely irrelevant, "1340" being (or so counsel represented) "defunct". In the event, when she did appear Zagrabelny testified that, far from being "defunct", "1340" was involved in every aspect of MEA's political-action program. A. 316-17.

[57] A. 313-18. For example, Sands testified that "I don't think the ['1340'] concept ever got off the ground and was formalized", "the structure was never completed sufficiently to become a reliable vehicle in a useful way"; and Johnson averred that "[b]ack in the early days • • • we tried to get it going"—implying that nothing ever came of these efforts. Yet both Sands and Johnson recruited MCCFA members for "1340"; and Johnson was on the "1340" Task Force, the body delegated responsibility for organizing the group. Since, as Zagrabelny testified, "1340" was successfully organized, the contrary testimony of two of its organizers is at best highly suspect.

Moreover, Sands and Johnson are not simply peripheral characters in the UTP, who might be expected, as its attorneys lamely suggest, to "los[e] touch with the 1340 Club". B. 19. At one time or another, Sands was President of MCCFA, Chairman of MCCFA's Legislative Committee, a collector for IMPACE, a political-campaign activist and recruiter, a member of MEA's Governmental Relations Council, and a recruiter for "1340" itself. And Johnson was a long-time member of IMPACE's Board of Directors—and,

The UTP then expends a page of text trying to prove that certain testimony of Letorney was not evasive.[58] It says not a single word, however, about Letorney's other, false testimony.[59]

In a footnote, the UTP describes Petitioners' proofs against Mammenga as exemplifying a "fallacy".[60] The

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at the time of his deposition, Chairman of IMPACE. He, if anyone, was uniquely situated to know of the existence and activities of "1340" since, even as he claimed under oath that "1340" was "defunct", IMPACE was using reports from "screening" committees organized under "1340" auspices as a basis for endorsing candidates for public office.

Petitioners' charges against Sands and Johnson, then, are no "leaps in reasoning", as the UTP concludes. B. 20. Rather, they are direct applications of the insight that some testimony is inherently improbable on its face. *E.g.*, Quock Ting v. United States, 140 U.S. 417, 419, 420-21 (1891).

[58] B. 20-21. This Court can determine for itself whether Letorney's extensive testimony is evasive—for example, by considering his initial denial of involvement with "election pros" from a division of NEA other than his own, his initial attempt to characterize the activities of one of these "election pros" as "training" rather than out-and-out campaign work, and his repeated "lack of recollection". A. 249-50, 251-53, 254-58. The UTP does not contest this Court's authority to draw its own conclusions from the record. *E.g.*, Orvis v. Higgins, 180 F.2d 537, 539 & n.6 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950); Hellenic Lines Ltd. v. Brown & Williamson Tobacco Corp., 277 F.2d 9, 13 n.5 (4th Cir. 1960); Lang v. First Nat'l Bank of Houston, 215 F.2d 118, 120 & n.2 (5th Cir. 1954); Seagrave Corp. v. Mount, 212 F.2d 389, 394 (6th Cir. 1954); Dollar v. Land, 184 F.2d 245, 248-49 (D.C. Cir.), *cert. denied*, 340 U.S. 884 (1950).

[59] A. 258-59 n.108, *cited at* P. 16.

[60] B. 21 n.11. The appendix-reference the UTP cites illustrates one of its characteristic rhetorical devices: taking a secondary point out of context and pretending it constitutes the sum of Petitioners' case. "For example," the UTP says, "plaintiffs make much of Mr. Mammenga's statement that he was not a 'volunteer' of any particular candidate campaign." Reference to the record

only fallacy involved here, though, is the UTP's assumption that, by evading the issues, it can somehow convince this Court to accept its unsupported protestations of innocence. The record establishes that Mammenga testified to *no knowledge*: (i) of contacts between MEA and the Carter-Mondale campaign; (ii) of persons involved with the Carter campaign in the role of organizer or liaison; or (iii) of "anyone who was working in any kind of chairperson capacity to this or that committee, Carter-Mondale". Yet the record also establishes that President-Elect Carter wrote to MEA's President, singling out Mammenga for special praise, and that Sokup and Zagrabelny testified to Mammenga's involvement as an "advance-man", to his participation in efforts to recruit members of MEA for Carter-Mondale, and to his contacts with the campaign-staff.[61] The irreconcilable contradictions in the evidence thus pit Mammenga and the UTP's attorneys, on the one side, against Sokup, Zagrabelny, and President Carter, on the other. Only further discovery can determine which side is the more credible.[62]

The UTP's reference to McFarland's testimony is another studied evasion.[63] Petitioners never accused

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as a whole, though, explodes both this characterization, and the incoherent argument the UTP spins out of it. *Compare* A. 359 (the UTP's argument) *with* A. 219-22 (Petitioners' complete case against Mammenga) *and* A. 384-85 (Petitioners' refutation of the UTP's argument).

[61] A. 219-22.

[62] Indeed, the existence of this question alone sustains Petitioners' request for further discovery against MEA and IMPACE, particularly direct inspection of their files and redeposition of Mammenga himself. A. 28-29.

[63] B. 21. Note 60, *supra*, describes the rhetorical technique involved in the UTP's identifying "Plaintiffs true complaint".

McFarland of "denying" that "NEA's procedure for the endorsement of a 1976 presidential candidate" existed, as the UTP pretends. Rather, Petitioners charged him with false and evasive testimony concerning: (i) plans for mobilizing UTP officials, staff-personnel, and members throughout the country as campaign-workers for the 1976 presidential endorsee; (ii) cooperation between the UTP and the Carter-Mondale campaign-staff; (iii) the production and distribution of kits to aid local UTP organizers in recruiting campaign-workers; and (iv) the UTP's "member-contact" program on behalf of Carter-Mondale.[64] On these matters, the UTP remains silent.[65]

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[64] P. 19-22, *summarizing* A. 137-43, 195-219, 223-34, 412-13 n.2.

[65] And the non-responsive argument it does proffer deceptively plays on words. The UTP talks of "the NEA's procedure for the endorsement of a 1976 presidential candidate" and of "a time line for the endorsement by NEA members"—as if the UTP's only involvement in the 1976 campaign was the organization's endorsement itself. Actually, as the plan withheld from Petitioners by the UTP but reproduced in the Shotts thesis shows, the Program to Implement the NEA Presidential Endorsement Procedure (NEA Government Relations Department, 13 Jan. 1975) contained much more. From its "Introduction":

> At the 1974 convention, the Representative Assembly adopted a procedure for endorsement of a Presidential candidate. The purpose of this paper is to describe a two-year, NEA-wide program for implementing the procedure. The objectives of this program are as follows:
>
> 1. Prepare members to support Presidential endorsement by NEA.
> 2. Mobilize organizational forces to affect selection of party nominee(s).
> 3. Gain party and candidate support for NEA positions on education issues.
> 4. Mobilize organizational forces to elect endorsed Presidential candidate.
>
> Meeting these objectives will achieve for NEA the acknowledgement by the parties and candidates that NEA is indeed a major political force. • • •

The UTP finally claims that

> [t]he primary evidence advanced in support of [the "cover-up"] * * * lies in the recollection of a statement allegedly made by MEA employee Kenneth Bresin while surreptitiously interviewed by one of the detectives * * * .
>
> • • • •
>
> * * * it is impossible to fathom how a "cover-up conspiracy" engineered by defendants' counsel can be adduced from the record. "NEA attorneys" gave legal advice to their clients.[46]

Petitioners' primary evidence, however, is far more extensive than the UTP admits, and includes:

> • Bresin's and Vander Woude's false and evasive testimony about involvement in the candidate's telephone-bank operation.[47]

The activities within each objective are detailed. Supplemental attachments will provide further specifics as they are developed (i.e., time schedules) or as they become known (i.e., procedures for delegate selection to the national nominating conventions).

It is important to emphasize at the outset that, to be successful, this program requires effort by the total organization. While GR has been charged with the development of the program plan and will coordinate its implementation, organizational responsibility for many aspects of the program will lie elsewhere. It will be necessary to utilize resources and expertise from many of the goal areas and support units. In addition, the smooth and successful operation of the program requires the cooperation and active involvement of our state affiliates.

C.T. Shotts, "The Origin and Development of the National Education Association Political Action Committee, 1969-1976" (Ph. D. thesis, Indiana Univ., Aug. 1976), Appendix G, at 136 (footnote omitted).

[46] B. 22.

[47] A. 260-75, 279-83.

- Bresin's concealment of the use of hundreds of MEA computer print-outs in the telephone-bank, and of the MEA Print Shop's role in preparing campaign-materials.[68]

- Vander Woude's adoption of an assumed name in the telephone-bank.[69]

- Vander Woude's remarks about the *Knight* litigation in the telephone-bank, and his subsequent denial of knowledge about the case.[70]

- The mysterious "MEA policy" against political involvement by UTP staff-personnel, that neither Bresin nor Vander Woude followed.[71]

Against this background, Bresin's statement about "NEA's attorneys" and their advice compels the conclusion that there was, indeed, a "cover-up". If "NEA's attorneys" had given only legal advice—with emphasis on the adjective *legal*—why then did Bresin testify falsely about what he and Vander Woude did in the telephone-bank? Why then did Vander Woude attempt to deny his long-standing knowledge about this case? And why then did both refer to the "MEA policy" that no one honored? Only the discovery Petitioners seek, and the District Court denied, can answer these questions.[72]

The foregoing establishes that the UTP's articulated defense on the merits is a sham. And that the UTP refrains from even attempting to explain away the

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[68] A. 263-64, 275-79, 283-87.

[69] A. 262-66, 272-73.

[70] A. 290-91. *See also* A. 287-89.

[71] A. 291-96.

[72] *See* A. 296-97 for Petitioners' tentative conclusions.

testimony of Baker, Chesebrough, Harman, and Lowell is an admission of its impotency to exonerate these deponents.[73]

Document-Production

With regard to production of documents, the UTP first says that

> [s]pecific limitations concerning correspondence files were subject to negotiated agreement between the parties. * * * Plaintiffs' counsel never objected to the results of such negotiation. * * * At no time prior to December 30, 1978 did plaintiffs' counsel express any objection to the quality of document production nor did they ever move the [District] Court to compel the production of documents.[74]

The record, however, contains numerous examples of explicit questions about, objections to, and demands for document-production.[75] In addition, the so-called "negotiated agreement[s] between the parties" were at best ultimata from the UTP's attorneys telling Petitioners to "take it or leave it".[76] Furthermore, Petitioners had no obligation to move to compel production of documents *seriatim* prior to the motion the District

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[73] By singling out Baker, Bresin, Chesebrough, Harman, Johnson, Letorney, Lowell, Mammenga, McFarland, Sands, and Vander Woude, Petitioners do not concede that the rest of the UTP's twenty-nine officials and staff-personnel testified candidly. Absent complete production of documents, the testimony of every deponent remains under a cloud.

[74] B. 23.

[75] A. 147-90, *and especially* A. 147-48, 149-52, 169-72, 178, 179, 188-90.

[76] A. 380-82. And Petitioners never waived their right to object thereafter. *See, e.g.*, B. at A-62 to A-63, A-76 (reservations of right to object by Petitioners' counsel).

Court denied in its order of 4 April 1979. Indeed, by meeting with the UTP's counsel, Petitioners satisfied Local Rule 5: In those meetings, the UTP announced what documents it would produce; and after Petitioners determined that that production was unsatisfactory and illegal, they sought Rule 37(a) relief, precisely as the Local Rule contemplates.[77] That Petitioners combined their many objections, and the extensive evidence supporting them, into a single, comprehensive motion was their privilege.

The UTP's rationalization of its refusal to comply with the Magistrate's order commanding production of the NEA Archives is the ultimate admission of its bad faith. The Archivist, the UTP says, showed its attorneys where to look for relevant information; and they looked.[78] Looking, though, is not equivalent to producing. And the attorneys admitted on the record that they produced only "selected portions" and "a fair sampling" of the documents identified to them.[79] Moreover, caught withholding certain documents so obviously relevant that even they could invent no excuse for their behavior, the UTP's attorneys reluctantly disgorged the materials.[80] Their last-minute compliance, however, cannot obscure the reality that they had initially withheld the documents without notice to

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[77] Local Rule 5 provides in pertinent part as follows:

> Conditions for discovery motions. No objection • • • to answers • • • relating to • • • discovery matters shall be heard unless it affirmatively appears that counsel have met and attempted to resolve their differences. • • •

[78] B. 23-24.

[79] A. 149-52, 161-63, 169-72.

[80] A. 169-71.

Petitioners, and would not have produced them at all absent the persistent demands of Petitioners' counsel.

Finally, the UTP admits it has destroyed documents, but then glosses over its wrongdoing as "two isolated incidents" impliedly involving but a few pages of material.[81] To be sure, McFarland testified that certain identified documents might have been destroyed.[82] But Petitioners' major complaint is that whole files, not just one or two documents, have apparently disappeared—and that those were the very files of Harman and McFarland, the top men in NEA's Government Relations Department who supervised the planning and implementation of the UTP's activities in the 1976 elections. Moreover, the admissions of document-destruction come from none other than the secretary to NEA staff-counsel Hanna (who said that certain of Harman's files "have been destroyed—for whatever reasons"), and the UTP's lead counsel Miller (who represented to Petitioners that certain of McFarland's files have also ceased to exist).[83] Thus, for the UTP now to belittle these admissions as "a gross exaggeration" is at best disingenuous, if not wholly impermissible.[84]

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[81] B. 24-25.

[82] A. 192.

[83] A. 190-92.

[84] The admissions were not simply casual observations. At the time, the UTP asserted the destruction of documents as its sole excuse for their non-production. For the UTP now to contend that but a few documents are involved, when previously it withheld whole files on the basis of its representations, is an unconscionable attempt to profit from its own wrongdoing.

CONCLUSION

In summary, without rebuttal by the UTP, Petitioners have shown that:

(i) the District Court's order foreclosing further discovery in this case denies Petitioners the necessary means to prepare a complete factual record on the constitutional issues they raise;

(ii) should an extraordinary writ not issue on their behalf, they will suffer irreparable injury from that order;

(iii) this Court has exclusive jurisdiction under the All Writs Act to hear their Petition for Extraordinary Writ;

(iv) if this Court does not hear the Petition, the District Court's order may subvert or defeat its ultimate appellate jurisdiction in this case; and

(v) on both the law and the facts, the District Court's order is an unprecedented misapplication of the Federal Rules of Civil Procedure, and a clear violation of the Fifth Amendment, that raises an issue of first impression central to the proper and efficient administration of federal trial-courts in civil litigation.

For these reasons, Petitioners respectfully request this Court to grant their motion for leave to file the Petition for Extraordinary Writ, and either issue the writ forthwith or set down this cause for oral argument.

Respectfully submitted,

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10 September 1979

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rules 31(1), 33 (1), and 36(1) of the Rules of this Court, I have served three copies of Petitioners' Reply Brief on each of the following Respondents or Counsel for Respondents, by mailing said copies to the addresses listed below, first-class postage-prepaid priority mail.

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Done this tenth day of September, 1979.